

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

**Contreras & Metelska, P.A.,**

Plaintiff,

v.

**Executive Office for Immigration Review  
and U.S. Department of Justice**

Defendants.

Civil No.: \_\_\_\_\_

**Complaint for Declaratory  
and Injunctive Relief**

**INTRODUCTION**

1. Plaintiff brings this action to redress violations of the Freedom of Information Act (“FOIA”). The Defendants have failed to timely respond to Plaintiff’s FOIA request.
2. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, seeking to compel the Executive Office for Immigration Review (“EOIR”), a component of the U.S. Department of Justice (“DOJ”), to immediately release records containing information about its policies and practices related to how and why they classify certain FOIA requests as “complex.”
3. Plaintiff also seeks to compel EOIR to immediately release records containing information about its prior use of its own Interactive Scheduling System (“ISS”) and how EOIR previously interacted and/or collaborated with the Department of Homeland Security (“DHS”) with regards to the issuance of Notices to Appear (“NTAs”) in the immigration context.

4. With respect to ¶ 3 of this Complaint, Plaintiff further seeks to compel EOIR to immediately release records containing information about whether or not EOIR colluded with DHS to circumvent the Supreme Court’s ruling in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) [hereinafter “*Pereira*”] by allowing DHS to continue filing NTAs with EOIR which were devoid of information the Supreme Court, in *Pereira*, held to be statutorily required after *Pereira* was decided and/or by encouraging DHS to provide “dummy dates”<sup>1</sup> on NTAs.
5. With respect to ¶ 3 of this Complaint, Plaintiff additionally seeks to compel EOIR to immediately release records containing information about whether or not EOIR instructed or informed DHS to continue filing statutorily deficient NTAs, or otherwise indicated to DHS that DHS need not comply with *Pereira*, after *Pereira* was decided. *See generally* 138 S. Ct. 2105.
6. A NTA is the mechanism most used by DHS to initiate removal proceedings against noncitizens. As such, it is of tantamount importance that DHS is complying with the Supreme Court’s decisions, as they relate to NTAs. Removal proceedings are highly traumatic events which, by design, tear apart familial units. Common side effects of removal proceedings include, *inter alia*: substantial legal fees, psychological trauma, harm to third-parties (family members, friends, lenders, etc.), and prolonged detainment. When people are removed in error, the harms can, and often do, become much more severe. EOIR’s practice of accepting statutorily deficient NTAs rendered the Supreme Court’s decision in *Pereira* a nullity for many noncitizens who were forced to defend

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<sup>1</sup> After *Pereira* was decided, DHS began a practice of issuing NTAs which contained times and/or dates that are impossible for a noncitizen to attend. For example, there are numerous credible reports of noncitizens receiving NTAs with dates that fall on weekends or times at which EOIR is not open to the public. These practices are referred to in this Complaint as “dummy dates” and are referred to in the underlying FOIA request as “ghost” times/dates.

themselves in removal proceedings, overseen by EOIR, which were initiated by instruments incapable of vesting jurisdiction with EOIR (EOIR has acknowledged that NTAs are jurisdictional in nature).

7. Given the uptick in enforcement against longtime immigrant communities, there is an urgent need to inform the public about EOIR's policies and practices with respect to how EOIR interacts with DHS to initiate removal proceedings. EOIR has, thus far, refused to make public this critical information that is necessary to: (1) allow the public, including courts, assess the degree to which DHS' filing of a NTA with EOIR comports with individuals' constitutional, statutory, and regulatory rights; and (2) provide guidance for noncitizens and their attorneys to make informed decisions about how to proceed in cases with deficient charging documents.
8. For these reasons, Plaintiff, Contreras & Metelska, P.A. ("Contreras & Metelska"), submitted two FOIA requests to EOIR. The first FOIA request sought information, as delineated by ¶¶ 3-5 of this Complaint (and other related information), on January 21, 2019. EOIR acknowledged receipt of the request, but failed to respond in any cognizable manner until February 13, 2019 (23 days later). EOIR's response simply deemed Plaintiff's FOIA request as "complex" and stated that complex requests require additional processing time. The second FOIA request sought information, as delineated by ¶ 2 of this Complaint, on March 4, 2019. To date, Plaintiff has not received any response to its second FOIA request.
9. Defendants are unlawfully withholding information sought by Plaintiff, Contreras & Metelska, information to which it is entitled and for which no valid disclosure

exemption applies. Defendants have failed to comply with the statutory mandates and deadlines imposed by FOIA.

### **JURISDICTION AND VENUE**

10. This Court has jurisdiction pursuant to 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(C)(i). Because this action arises under FOIA against an agency of the United States, this Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.
11. Venue lies in this District under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

### **PARTIES**

12. Plaintiff, Contreras & Metelska, is an immigration law firm with its principal place of business located at 200 University Avenue W., STE 200, Saint Paul, MN 55103. Founded in 2009, Contreras & Metelska provides legal assistance to noncitizens. Contreras & Metelska represents numerous clients whose removal proceedings were initiated by deficient NTAs after *Pereira v. Sessions* was decided. Contreras & Metelska is and remains open to partnering, and has previously partnered, with nonprofit legal firms and local news agencies to spotlight troublesome behavior by government actors with regards to the government's occasional misconduct in immigration proceedings. Contreras & Metelska frequently sends attorneys it employs to Spanish-speaking radio stations to inform the Spanish-speaking citizens and noncitizens of current immigration issues in a longstanding and concerted effort to boost awareness of hot-button issues. Contreras & Metelska believes that the government's misconduct, with regards to its handling of NTAs is worthy of public attention. Contreras & Metelska seeks to hold the government accountable for failing

to ensure that immigration laws are implemented and executed in a manner that comports with due process and applicable laws and regulations.

13. Defendant U.S. Department of Justice (“DOJ”) is an agency of the United States government and an agency within the meaning of 5 U.S.C. § 552(f)(1).
14. Defendant Executive Office for Immigration Review (“EOIR”) is a subcomponent of DOJ, 8 C.F.R. § 1003.0(a), and an agency within the meaning of 5 U.S.C. § 552(f)(1). EOIR is comprised of Immigration Courts and the Board of Immigration Appeals (“BIA”). *See* 8 C.F.R. § 1003.0(a).
15. Defendants have custody and control over the records the Plaintiff seeks to have made publicly available under 5 U.S.C. § 552(a)(2).

### **EXHAUSTION**

16. Plaintiff has exhausted its administrative remedies as required by law. Defendants failed to make and communicate its determination whether to comply with either of Plaintiff’s FOIA requests within the statutory timeline. *See* 5 U.S.C. § 552(a)(6)(C)(i).

### **STATEMENT OF FACTS**

17. Since early 2017, immigration enforcement against noncitizens residing in the United States has increased over 40 percent and continues to rise. As part of this shift, ICE began to conduct raids—mass-scale arrests—more frequently in immigrant communities.
18. Any noncitizen placed in removal proceedings, who has not already been granted an immigration benefit and who has not previously been deported, removal proceedings’ are initiated against them through DHS’ filing of a NTA with EOIR.

19. EOIR has the ability to reject improper NTAs but often has previously chosen, instead, to accept statutorily deficient NTAs. This behavior occurred both prior to and after the Supreme Court decided and issued *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).
20. The Immigration and Nationality Act and accompanying regulations codify mechanisms to protect individuals from having to defend against suits for removal by courts or agencies which lack jurisdiction to hear such suits by requiring specific charging documents, such as NTAs, be used to initiate removal proceedings. Because removal proceedings tend to have drastic and detrimental consequences for individuals, families, and communities, Congress decided that charging documents, such as NTAs, must contain very specific minimum requirements, including the time, place, and date of proceedings. On June 21, 2018, the Supreme Court acknowledged this clear congressional intent in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The Supreme Court also held that the statute governing the issuance of NTAs, 8 U.S.C. § 1229(a), is unambiguous and that a NTA lacking any statutorily required element is not a NTA. *See* 138 S. Ct. at 2110.
21. On December 21, 2018, the Director of EOIR, James R. Henry III, issued a policy memorandum (PM 19-08) which acknowledges that jurisdiction does not vest with EOIR unless and until a NTA is filed with EOIR which comports with all statutory requirements. *See* Policy Memorandum 19-08 (Dec. 21, 2018), <https://www.justice.gov/eoir/file/1122771/download> at 1-2.
22. On January 21, 2019, Plaintiff filed a FOIA request, via email to [EOIR.FOIARequests@usdoj.gov](mailto:EOIR.FOIARequests@usdoj.gov), to request information about EOIR's efforts to comply with the Supreme Court's ruling in *Pereira*.

23. On February 13, 2019, Defendant EOIR, through email correspondence from Mr. Joseph R. Schaaf (“Mr. Schaaf”), acknowledged receipt of Plaintiff’s FOIA request. Mr. Schaaf deemed the FOIA request as extremely “complex” and projected it would take 180 days to complete Plaintiff’s request as written.
24. On February 14, 2019, the undersigned responded to Mr. Schaaf and informed Mr. Schaaf that 180 days seemed excessive. The undersigned asked Mr. Schaaf if he could improve the anticipated response time so as to avoid the need for litigation. Mr. Schaaf simply responded by stating that Plaintiff’s request is a “Track 3 complex request” and that it has been assigned to attorney Shelley O’Hara (“Ms. O’Hara”) for processing.
25. On February 28, 2019, Ms. O’Hara emailed the undersigned to notify Plaintiff that Plaintiff’s request was deemed a commercial use request meaning that Plaintiff will be responsible for all direct costs associated with processing Plaintiff’s request and that processing fees are expected to exceed \$25. Ms. O’Hara stated that Plaintiff’s request will be put on hold until Monday, April 1, 2019, at which point it will be closed if Plaintiff does not respond.
26. On March 1, 2019, the undersigned responded to Ms. O’Hara and asserted that Plaintiff’s request is not a commercial use request and gave various reasons why and provided supporting citations. Plaintiff made clear to Ms. O’Hara that Plaintiff is requesting this information with the goal of holding the government accountable and informing the public of possible misconduct by federal agencies.
27. Also on March 1, 2019, Ms. O’Hara replied to Plaintiff’s response and stated she would consider the undersigned’s comments on the matter and notify Plaintiff of EOIR’s final

determination about whether Plaintiff's request qualifies for a waiver or reduction of fees as defined in 28 C.F.R. § 16.10(k). In the same email, Ms. O'Hara also stated that Plaintiff's request was currently number 70 on EOIR's "complex" docket.

28. On March 1, 2019, the undersigned asked Ms. O'Hara, via email, if EOIR has an average time frame it takes to process each "complex" request. Ms. O'Hara responded that processing time for complex requests varies greatly based on the scope of the request and the number of responsive documents. Ms. O'Hara then conveyed that in 2018, the lowest number of days taken to process a complex request was 1 day and the highest number of days was 258. Ms. O'Hara also provided a link to the last Annual Report to Congress for Fiscal Year 2018.
29. The Annual Report to Congress for Fiscal Year 2018 provides the following information about EOIR FOIA request processing times: (a) the median number of days taken to process "complex" requests is 23 days (6 days shorter than the median number of days for "simple" requests); (b) the average number of days for processing "complex" requests is 32.41 days (roughly 6 days short than "simple" requests); (c) the lowest number of days to process "complex" requests was *less than* 1 day; and (d) the highest number of days taken to process "complex" requests was 242 days.
30. The Annual Report to Congress for Fiscal Year 2018 provides the following volume-information about "complex" EOIR FOIA requests: (a) EOIR processed 140 complex FOIA requests in 20 days or less; (b) EOIR processed 95 complex FOIA requests in 21-40 days; (c) EOIR processed 39 complex FOIA requests in 41-60 days; (d) EOIR processed 17 complex FOIA requests in 61-80 days; (e) EOIR processed 8 complex FOIA requests in 81-100 days; (f) EOIR processed 2 complex FOIA requests in 101-120



days; (g) EOIR processed 2 complex FOIA requests in 121-140 days; (h) EOIR processed 1 complex FOIA request in 141-160 days; (i) EOIR processed 1 complex FOIA request in 161-180 days; (j) EOIR processed 1 complex FOIA request in 181-200 days; (k) EOIR processed 4 complex FOIA requests in 200-300 days; and (l) EOIR processed zero (0) complex FOIA requests in 301 or more days.

31. According to the Annual Report to Congress for Fiscal Year 2018, less than 2% of complex FOIA requests have previously taken 160 days or more to process. Plaintiff relies on these figures in asserting that the anticipated 180-day response time is excessive.
32. As of April 2, 2019, Plaintiff has yet to receive any further correspondence from Ms. O'Hara.
33. On March 4, 2019, Plaintiff filed a second FOIA request, via an email sent to [EOIR.FOIARequests@usdoj.gov](mailto:EOIR.FOIARequests@usdoj.gov), requesting information related to: (a) criteria / criterion / rubrics used by EOIR agents to determine when a FOIA request *may* be deemed complex; and (b) documents which interpret, explain, restrict, expand, or supplement 28 C.F.R. § 16.5(b). Plaintiff never received any response from EOIR regarding this request.

## **CLAIMS FOR RELIEF**

### **CAUSE OF ACTION**

#### **Violation of the Freedom of Information Act, 5 U.S.C. § 552, for Failure to Respond within Time Required**

##### **COUNT I**

34. Plaintiff repeats, alleges, and incorporates, as fully set forth herein, each and every allegation contained in paragraphs 1-33 above.
35. The Defendants are obligated under 5 U.S.C. § 552(a)(6)(A)(i) to promptly produce records responsive to the Plaintiff's **January 21, 2019** FOIA request. Plaintiff has a legal right to obtain such records, and no legal basis for Defendants' failure to disclose them exists.
36. The Defendants' failure to disclose all responsive records violates, at a minimum, 5 U.S.C. § 552(a)(3)(A), as well as the regulations promulgated thereunder.

##### **COUNT II**

37. Plaintiff repeats, alleges, and incorporates, as fully set forth herein, each and every allegation contained in paragraphs 1-36 above.
38. The Defendants are obligated under 5 U.S.C. § 552(a)(6)(A)(i) to promptly produce records responsive to the Plaintiff's **March 4, 2019** FOIA request. Plaintiff has a legal right to obtain such records, and no legal basis for Defendants' failure to disclose them exists.
39. The Defendants' failure to disclose all responsive records violates, at a minimum, 5 U.S.C. § 552(a)(3)(A), as well as the regulations promulgated thereunder.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully prays for judgment against the Defendants as follows:

- a. Order the Defendants to expeditiously conduct an adequate search for all records responsive to the Plaintiff's FOIA requests in accordance with 5 U.S.C. § 552(a)(3)(C);
- b. Declare that the Defendants' failure to disclose the records responsive to the Plaintiff's request violates FOIA, 5 U.S.C. § 552(a)(3)(A), as well as the regulations promulgated thereunder;
- c. Declare that the Defendants' failure to promptly produce records responsive to the Plaintiff's request violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i);
- d. Order the Defendants to expeditiously process and disclose all responsive, nonexempt records, and enjoin the Defendants from improperly withholding records;
- e. Award the Plaintiff reasonable attorneys' fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E), and any other applicable statute or regulation; and
- f. Grant such other relief as the Court may deem just, equitable, and appropriate.

DATED: April 2, 2019

Respectfully submitted,

/s/ Nico Ratkowski

Nico Ratkowski

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